FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 22 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

DANIEL K. CATLIN, FREDERICK PITZMAN and LEWIS M. RUMSEY, JR., as Trustees Under Deed Dated February 1, 1921, and Recorded in the Public Records of Madison County, Illinois, in Book 471, at Page 621, Commonly Known as the Cool Land Syndicate,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

No. 419.

BRIEF OF DANIEL K. CATLIN ET AL., PETITIONERS.

THOMAS S. McPHEETERS,
HENRY DAVIS,
1630 Boatmen's Bank Building,
St. Louis, Missouri,
GEORGE D. BURROUGHS,
Edwardsville, Illinois,
Attorneys for Petitioners.

BRYAN, CAVE, McPHEETERS & McROBERTS,
WARNOCK, WILLIAMSON & BURROUGHS,
Of Counsel.

December 18, 1944.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Opinion below	1
Jurisdiction	1
Statement of the case	2
Specifications of error	4
Argument	5
I. A judgment on a declaration of taking and a subsequent order denying a motion to vacate such a judgment and to dismiss the proceedings are final and appealable within the meaning of 28 U. S. C. A., Sec. 225 (a)	5
II. The petition for condemnation failed to set forth the purpose for which the land was sought to be taken, and hence was not sufficient to give the Court jurisdiction of the cause of action, or to support passage of title from petitioners to the Government	11
III. The petition for condemnation, as amended, sets forth the purpose for which the land was sought to be taken, but the purpose so set forth is not one of the purposes for which condemnation is authorized by the act under which the proceeding was brought, and hence the suit cannot be maintained; the Court had no jurisdiction of the cause of action, and the proceedings should have been dismissed	17

Cases Cited.

Chappell v. United States, 81 Fed. 764	13
Chicago and Northwestern Railway Co. v. Galt, 133 Ill. 657, 667, 24 N. E. 674	16
Cincinnati v. Vester, 281 U. S. 439	13
City of Mound City v. Mason, 262 Ill. 393, 104 N. E. 685	15
City of Oakland v. United States, 124 Fed. (2d) 959	8, 18
City of Richmond v. Richmond & Danville R. R. Co., 21 Gratt. 604, 608 (Va. 1872)	24

Delaware, L. & W. R. Co. v. Morristown, 276 U. S. 182, 192 22
Department of Public Works v. Lewis, 344 Ill. 253, 176 N. E. 345 ..... 14, 23
Ex parte Hall, 1 Pick. 261 (Mass. 1823) 24
Harvey v. Aurora and G. Ry. Co., 174 Ill. 295, 304-305, 151 N. E. 163 ..... 15, 22
Heisler v. Thomas Colliery Co., 260 U. S. 235, 245 11
Lieberman v. Chicago R. T. R. Co., 141 Ill. 140, 30 N. E. 544 23
Northern Mining & Trading Co. v. Alaska Gold Recovery Co., 20 Fed. (2d) 5 20
Puerto Rico Ry. Light & Power Co. v. United States, 131 Fed. (2d) 491 9
Smith v. Chicago and Western I. R. R. Co., 105 Ill. 511 16
United States v. 243.22 Acres of Land, 129 Fed. (2d) 678, certiorari was denied 316 U. S. 679, 62 S. Ct. 1106 ..... 8, 9, 11
United States v. 8,557.16 acres of land in Pendleton County, W. Va., 11 Fed. Supp. 311 ..... 14, 15
United States v. Certain Tract of Land, 70 Fed. 940, 943 22
United States v. Eighty Acres etc., 26 Fed. Supp. 315 .. 22
United States v. Rauers, 70 Fed. 748 20
United States v. Sixty Acres etc., 28 Fed. Supp. 368 .. 22
United States v. Sunset Cemetery Co., 132 Fed. (2d) 163 7
United States v. Threlkeld, 72 Fed. (2d) 464, 466 22
United States v. West Virginia Power Co. et al., 33 Fed. Supp. 756 21

Textbooks Cited.

18 American Jurisprudence 650, 957 ..... 14, 21
29 Corpus Juris Secundum 806, 1135 22

Statutes Cited.

Declaration of Taking Act, 40 U. S. C. A., Sec. 258 (a) .5, 16
50 U. S. C. A. 171 12

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

DANIEL K. CATLIN, FREDERICK PITZMAN and LEWIS M. RUMSEY, JR., as Trustees Under Deed Dated February 1, 1921, and Recorded in the Public Records of Madison County, Illinois, in Book 471, at Page 621, Commonly Known as the Cool Land Syndicate, Petitioners, vs. THE UNITED STATES OF AMERICA, Respondent.	No. 419.

BRIEF OF DANIEL K. CATLIN ET AL., PETITIONERS.

OPINION BELOW.

The opinion of the Circuit Court of Appeals, dated June 2, 1944, is officially reported in 142 Fed. (2d) 781.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925 (28 U. S. C. A., Section 347). The judgment of the Circuit Court of Appeals was entered on June 2, 1944 (R. p. 52). The petition for certiorari was filed by petitioners on September 1, 1944, and was granted by this Court on October 23, 1944.

STATEMENT OF THE CASE.

On March 31, 1942, the United States of America filed in the District Court of the United States for the Southern District of Illinois, Southern Division, its petition for condemnation whereby the Government sought to condemn 1,113 acres of land, more or less, situated in Madison County, Illinois (R. p. 2). The petition stated that it was filed pursuant to the Act of August 18, 1890, as amended, 50 U. S. C. A., Section 171, and the Appropriations Act of December 17, 1941, 55 Stat. 810 (R. p. 3).

On November 12, 1942, there was filed in the office of the Clerk of said District Court a Declaration of Taking No. 1 (R. p. 13). Thereafter, and on the same 12th day of November, 1942, said District Court entered its Judgment on First Declaration of Taking, by the terms of which the Court "Ordered, Adjudged and Decreed that the title to said lands in fee simple absolute, and together with the buildings and improvements thereon and the appurtenances thereto appertaining, subject only to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, be vested* in the United States of America upon the filing of the said Declaration of Taking and the depositing in the Registry of this Court of the amount of estimated just compensation, to-wit, the sum of $105,770.00 * * *," which sum the Court found in the said judgment had already been so deposited (R. p. 23).

On August 2. 1943, one year and four months after the original petition was filed, the District Court made and entered its Order of Publication, pursuant to which service was had upon your petitioners (R. p. 28).

In due course, on October 7, 1943, petitioners filed in said District Court their Motion to Vacate Judgment and to Dismiss, in which petitioners challenged both the sufficiency of the Petition for Condemnation and the authority

*Through an obvious typographical error the record reads "veseted" (R. p. 24).

of the Government to condemn for the purpose for which the land was sought to be taken, under the Act pursuant to which the petition was filed (R. p. 29). Thereafter the Government amended its petition for condemnation (R. p. 31), and your petitioners filed their Amended Motion to Vacate Judgment and to Dismiss, again challenging both the sufficiency of said amended petition and the authority of the Government to take the land for the purpose disclosed by such amended petition, under the Act pursuant to which the suit was brought.

On November 30, 1943, the Court entered its order denying petitioners' Amended Motion to Vacate Judgment and to Dismiss, and on December 9, 1943, petitioners appealed to the United States Circuit Court of Appeals for the Seventh Circuit from (a) the judgment on declaration of taking made and entered on November 12, 1942, and (b) the judgment and order made and entered on November 30, 1943, overruling and denying the Amended Motion to Vacate Judgment and to Dismiss.

The case having been duly briefed, argued and submitted, the United States Circuit Court of Appeals for the Seventh Circuit entered its judgment dismissing the appeal and in its opinion stated that "It is sufficient, and we decide nothing more, that a judgment rendered upon a Declaration of Taking is interlocutory and not subject to review." This Court duly issued its writ of certiorari and petitioners seek to have the order and judgment of the Circuit Court of Appeals reviewed and reversed.

Although the Circuit Court of Appeals refused to pass upon the merits of the appeal, your petitioners seek to have this Court not only review and reverse the order and judgment of the Circuit Court of Appeals as to the appealability of the judgment below, but also to review and decide on its merits the question presented by the said appeal. Such additional facts as may be necessary for the consideration of said appeal on its merits will be set forth in the argument.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals erred:

(1) In holding that a judgment rendered upon a declaration of taking is interlocutory and not subject to review and in dismissing the appeal; and

(2) In failing and refusing to consider and decide said appeal on its merits and to enter its order and judgment that the petition and proceedings should be dismissed and the judgment in declaration of taking vacated.

ARGUMENT.

I.

A Judgment on a Declaration of Taking and a Subsequent Order Denying a Motion to Vacate Such a Judgment and to Dismiss the Proceedings Are Final and Appealable Within the Meaning of 28 U. S. C. A., Sec. 225 (a).

Under the provisions of the Declaration of Taking Act, 40 U. S. C. A., Section 258 (a), upon the filing by the petitioner in any condemnation proceeding instituted by and in the name of and under the authority of the United States of a Declaration of Taking and the deposit in the Court of the estimated compensation, "title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America." The Act goes on to provide that "compensation shall be ascertained and awarded in said proceeding and established by judgment therein," but makes no provision for any other judgment of the Court, interlocutory or final, with respect to the title to the land.

In its opinion the Circuit Court of Appeals held that no judgment on declaration of taking was necessary and rendered no aid to the vesting of title in the Government, since, under the statute, title automatically vested in the Government upon the filing of the declaration of taking.

The Circuit Court of Appeals went further and said in its opinion:

> "Furthermore, we are doubtful if the procurement of title by the Government under a Declaration of Taking is open to attack. It would seem that the validity of the Government's action in taking is dependent solely upon its authority to condemn. If it has the authority to condemn, there follows under the Act the absolute right to take. If there is a lack of authority to condemn, there is also a lack of authority

to take. In other words, the authority to condemn and the right to take must stand or fall together. We need not go this far, however, is deciding the question before us. It is sufficient, and we decide nothing more, that a judgment rendered upon a Declaration of Taking is interlocutory and not subject to review" (R. pp. 51-52).

It is obvious that the Circuit Court of Appeals has overlooked the fact that in the present case petitioners did challenge the Government's authority to condemn, as will be discussed more specifically in a subsequent section of this argument. Petitioners deny that the Government has the authority to condemn under the Act pursuant to which the suit was brought for the purpose for which the land was sought to be taken. The very purpose of the appeal was to obtain a decision of the Circuit Court of Appeals on the merits of this particular question. Petitioners appropriately challenged the sufficiency of the petition for condemnation to give the District Court jurisdiction to proceed by not only moving to vacate the Judgment on Declaration of Taking, but also by moving to dismiss the proceedings. The appeal was taken, not merely from the Judgment on Declaration of Taking itself, but also from the order overruling and denying petitioners' Amended Motion to Vacate Judgment and to Dismiss (R. p. 37).

It is immaterial whether or not a judgment on Declaration of Taking is required or permitted under the Act. Whether petitioners were divested of title to their land by reason of the mere filing of the Declaration of Taking or by the entry of the Judgment on Declaration of Taking or not, is of little moment. The ultimate fact is that ostensibly and of record the title to their land was taken from them and vested in the United States. If the Government had authority to condemn, if the pleadings complied with the statutes and were sufficient for the purpose, then nothing else remained to be done to finally and forever divest

petitioners of the title to their property and vest the same in the Government. Whether such passage of title occurred automatically on November 12, 1942, upon the filing of the Declaration of Taking, or a few minutes later on the same day upon the entry of a Judgment on Declaration of Taking is of no consequence. It is clear that nothing further was required in order to accomplish the transfer of title. It did not depend upon the entry of any final judgment at the conclusion of the proceedings after the making of an award as to the amount of compensation. When the petitioners, having been served by publication, long after the proceedings had been instituted and the Declaration of Taking filed and judgment entered thereon, filed their original Motion to Vacate Judgment and to Dismiss, and, subsequently, their Amended Motion to Vacate Judgment and to Dismiss, and when the Court entered its order denying said amended motion, they had challenged in an orderly way the Government's authority to condemn and the sufficiency of the proceedings, and were met with a ruling of the Court, the effect of which was to uphold the Government's authority to condemn and the sufficiency of the proceedings, and to rule that petitioners had been effectively divested of all right, title and interest in their land. So far as the title to the real estate was concerned, there was a final decision; the proceedings were at an end. The only thing that remained to be determined was the amount of the award, but any determination of that question would not and could not have any bearing upon the passage of title to the property. This was recognized by the Circuit Court of Appeals for the Seventh Circuit in its earlier decision in the case of **United States v. Sunset Cemetery Co., 132 Fed. (2d) 163**, where the Court not only held that title passed upon the filing of a Declaration of Taking, but that the Government could not itself thereafter by an amendment to the Declaration of Taking divest

itself of or destroy the title so acquired. The Court specifically held that after the filing of a proper Declaration of Taking the Court had no further jurisdiction with respect to the title to the property, saying, l. c. 165:

> "Thereafter the Court had only jurisdiction to determine what was just compensation for the tract, how much of it should pass to the owner, subject to lesser estates therein, and how much to the holder of lesser estates."

The contention that a decision such as the one in the present case is a final decision and appealable within the meaning of 28 U. S. C. A. Section 225 (a) has been upheld, expressly or by necessary implication, by three different Circuit Courts of Appeals.

In the case of **City of Oakland v. United States, 124 Fed. (2d) 959 (C. C. A. 9th, 1942)**, there was involved an appeal from a judgment entered under the same Act and under circumstances exactly parallel with those of the present case. In that case a petition for condemnation was filed on January 15, 1941, and on the same day, ex parte, a judgment of condemnation was entered. The defendant in due course filed a motion to vacate such judgment, which the trial court denied and an appeal was taken both from the judgment and from the order denying the motion to vacate the same. The Ninth Circuit Court of Appeals accepted jurisdiction and passed on the merits, although the question as to appellate jurisdiction was duly raised by the briefs. While the opinion does not discuss the question, the Second Circuit Court of Appeals, in its opinion in the case of **United States v. 243.22 Acres of Land, 129 Fed. (2d) 678**, points out, l. c. 683, that although the Court of Appeals in its opinion in the Oakland case does not mention the question of appellate jurisdiction, nevertheless, "our examination of the briefs shows that the question had been raised." Certiorari was denied, 316 U. S. 679, 62 S. Ct. 1106.

In the case of **United States v. 243.22 Acres of Land,** supra, the Second Circuit Court of Appeals discusses this question in a well reasoned opinion containing a lengthy review and discussion of the authorities, including the decision in the City of Oakland case, to which opinion we respectfully refer the Court. Again certiorari was denied by the Supreme Court, 317 U. S. 698, 63 S. Ct. 441 (Lambert v. United States).

Subsequently the First Circuit Court of Appeals in the case of **Puerto Rico Ry. Light & Power Co. v. United States, 131 Fed. (2d) 491,** was confronted with the same question, and made the same ruling, saying, l. c. 494:

> "At the outset the United States challenges our jurisdiction to entertain the appeal, on the ground that the judgment is not a 'final decision' within the meaning of Sec. 128 of the Judicial Code, 28 U. S. C. A., Sec. 225. It is said that the judgment merely determined the Government's right to condemn, leaving damages for the taking yet to be assessed, and that it is therefore not a final and appealable judgment. This contention has been squarely rejected by the Second Circuit in a careful opinion reviewing all the authorities. United States v. 243.22 Acres of Land, 2 Cir., 1942, 129 F. (2d) 678. We agree with this decision. See also City of Oakland v. United States, 9 Cir., 1942, 124 F. (2d) 959, certiorari denied 1942, 316 U. S. 679. A lengthy opinion by us on the point would therefore be superfluous. The judgment now in question is a 'final decision,' for purposes of appealability, within the principle of the following decisions of the Supreme Court: Forgay v. Conrad, 1848, 6 How. 201, 204, 12 L. Ed. 404; Thomson v. Dean, 1868, 7 Wall. 342, 345, 19 L. Ed. 94; Ex parte Farmers' Loan & Trust Co., 1889, 129 U. S. 206, 213-215, 9 S. Ct. 265, 32 L. Ed. 656; Knox National Farm Loan Ass'n v. Phillips, 1937, 300 U. S. 194, 197, 198, 57 S. Ct. 418, 81 L. Ed. 599, 108 A. L. R. 738. Luxton v. North River Bridge Co., 1893, 147 U. S. 337, 13 S. Ct. 356, 37 L. Ed. 194,

relied on by the United States, is adequately distinguished in United States v. 243.22 Acres of Land, supra, at page 682 of 129 F. (2d). We said in Hubert Hermanos, Inc., v. People of Puerto Rico, 1 Cir., 1941, 118 F. (2d) 752, 757: 'A "final decision" is not necessarily the ultimate judgment or decree complete closing up a proceeding. In the course of a proceeding there may be one or more final decisions on particular phases of the litigation, reserving other matters for future determination.' Under the earlier act of August 1, 1888, 25 Stat. 357, 40 U. S. C. A., Sections 257, 258, establishing the procedure for the judicial condemnation of land, there could be no judgment affecting title or possession until after the damages had been determined. It was the particular purpose of the Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. A., Sections 258a-258e, to sever the taking of title and possession from controversies as to valuation, and to provide a procedure whereby the United States might be speedily and conclusively vested with title and possession, with authority to demolish existing structures on the condemned land, leaving the issue as to the amount of compensation to be determined in subsequent proceedings. The judgment on the declaration of taking, having this final and immediate effect on property rights, obviously should be reviewable at once, without the necessity of awaiting the outcome of long drawn out controversies as to valuation. Therefore, on reason as well as on authority, we hold that the judgment in question is a 'final decision' within the meaning of Section 128 of the Judicial Code."

The Government, in its brief filed in the Circuit Court of Appeals and in its brief filed in this Court in opposition to the Petition for Writ of Certiorari, has cited a number of decisions, including several of this Court, to the effect that in condemnation suits an appeal may not be taken until the damages have been assessed. However, none of these cases arose under the Declaration of Taking Act, but,

as pointed out by the Second Circuit Court of Appeals in the case of **United States v. 243.22 Acres of Land**, supra, l. c. 682, arose under statutes where "there could be and there was no judgment as to title and possession until after the damages had been determined."

In view of the above, we respectfully submit that the appeal is not premature, but is from a final decision within the meaning of 28 U. S. C. A., Section 225 (a).

We realize that the Supreme Court has ruled that on a review by certiorari in a case such as this it could, but, as a matter of policy, would not, consider and decide the issue which the Circuit Court of Appeals erroneously refused to consider. **Heisler v. Thomas Colliery Co., 260 U. S. 235, 245.** However, we trust that in the present case the Court will elect to pass upon the merits of the appeal as presented to the Circuit Court of Appeals, and the rest of the Argument will be devoted to that question.

II.

The Petition for Condemnation Failed to Set Forth the Purpose for Which the Land Was Sought to Be Taken, and Hence Was Not Sufficient to Give the Court Jurisdiction of the Cause of Action, or to Support Passage of Title From Petitioners to the Government.

An examination of the original Petition for Condemnation (R. p. 2) will disclose that, while it set forth the purposes for which condemnation is authorized under the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), and April 11, 1918 (40 Stat. 518), 50 U. S. C., Section 171, (a) it failed to set forth the purpose for which the property was sought to be taken or indicate that it was for any one or more or all of the purposes per-

mitted by the said Act; (b) it failed to set forth or allege that the Secretary of War had made any finding or determination that the land was needed for any one or more or all of the purposes for which condemnation is authorized by said Act, and (c) it failed to set forth or allege that the Secretary of War had requested the Attorney General of the United States to institute proceedings to acquire the land for any one or more or all of the purposes for which condemnation is authorized by the said Act.

Since the petition failed to comply with the specific requirements of the statutes, it was insufficient to give the Court jurisdiction of the cause of action or to support a passage of title from the petitioners to the Government whether by means of the filing of a Declaration of Taking or by means of the entry of a Judgment on Declaration of Taking. And in this connection it must always be borne in mind that the filing of a Declaration of Taking and the entry of a Judgment on Declaration of Taking occurred many months before petitioners had been served and were before the Court.

The Act under which the suit is brought, 50 U. S. C. A. 171, specifically provides that:

> "The Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operations of such plants; **such proceedings to be prosecuted in accordance with the laws relating to**

> **suits for the condemnation of property of the States wherein the proceedings may be instituted * * *.**" (Emphasis added.)

The laws relating to suits for the condemnation of property in the State of Illinois are found in Chapter 47, Illinois Revised Statutes, 1943, where, in Section 2, it is provided that such proceedings shall be instituted by filing "a petition setting forth, by reference, his or their authority in the premises, **the purpose for which said property is sought to be taken or damaged * * *.**"

Petitioners, having been duly served by publication, pursuant to an order of publication made and entered in the District Court on August 2, 1943, entered their appearance, and on October 7, 1943, attacked the sufficiency of the Petition for Condemnation on the grounds indicated above by filing their Motion to Vacate Judgment and to Dismiss (R. p. 29). The Government, in effect, admitted the insufficiency of the original Petition for Condemnation by asking and obtaining leave to amend the same, and filing on November 17, 1943, its Amendment to Petition for Condemnation (R. p. 31). The effect of this amendment will be discussed more fully below.

It is well established that statutes delegating the power of eminent domain must be closely followed at every step in the proceedings. Thus the Supreme Court in the case of **Cincinnati v. Vester, 281 U. S. 439**, said, l. c. 448:

> "We understand it to be the rule in Ohio, as elsewhere, that the power conferred upon a municipal corporation to take private property for public use must be strictly followed."

And in the case of **Chappell v. United States, 81 Fed. 764,** the Circuit Court of Appeals for the Fourth Circuit, discussing this very Act and another Act of Congress giving jurisdiction of condemnation proceedings to Courts of the United States only, said, l. c. 766:

> "When proceedings are taken under either of these Acts, strict compliance must be had with all the provisions of law made for the protection of the land owner or the proceedings are ineffectual; and these proceedings must show affirmatively that the requirements of the law have been fulfilled."

In the case of **United States v. 8,557.16 acres of land in Pendleton County, W. Va., 11 Fed. Supp. 311,** the Court said, l. c. 313-314:

> "In view of the fact that eminent domain statutes are construed strictly, it is absolutely necessary that these statutes be followed closely at every step of the proceeding, otherwise sovereign acquires no title to the property attempted to be condemned."

And the rule has been stated in **18 American Jurisprudence 957** in the following language:

> "As we have already seen, the extent to which the power of eminent domain may be exercised is limited to the express terms or clear implication of the statute in which the grant is contained. Where, therefore, the state, a municipality, or other agent in charge of a public use, seeks to acquire, against the consent of the owner, private property for public use, the provisions of the authorizing act must be strictly complied with, and this must appear on the face of the proceedings for taking the land."

It is likewise well settled, particularly in the State of Illinois, that a petition in conformity with the statute granting the right to condemn is necessary to give the Court jurisdiction to proceed.

Thus in the case of **Department of Public Works v. Lewis, 344 Ill. 253, 176 N. E. 345,** the Court said, l. c. 255:

> "Section 2 of Eminent Domain Act has declared specifically what facts must appear on the face of the petition where the right to take private property for

public use without the owner's consent is sought to be enforced, and **the Court or Judge is powerless to take any action in the premises until a petition is filed containing the statutory requisites, for it is by the petition that jurisdiction of the subject matter is obtained.** Every petition must therefore contain all the statutory requirements and show the authority of the petitioner to take the specific land sought to be taken and the object or purpose for which it is required." (Emphasis added.)

And in the case of **City of Mound City v. Mason, 262 Ill. 393, 104 N. E. 685,** the Court said, l. c. 394:

> "**A petition in conformity with the statute granting the right of condemnation is necessary to give the court jurisdiction to proceed under the Eminent Domain Act.** It should set forth all the facts necessary to authorize the court to act and should show a clear right to take the land sought to be taken. It should show not only that the property is wanted for a public use, but that the case is within the particular statute under which the proceedings are held." (Emphasis added.)

Again, in the case of **United States v. 8,557.16 acres of land in Pendleton County, W. Va., 11 Fed. Supp. 311,** the Court said, l. c. 314:

> "Under the petition tendered to be filed by the Government in this case on this date, I am constrained to hold the Government has not complied with the statute, that **this court has no jurisdiction under the tendered petition,** that it is the duty of the court to raise questions of jurisdiction on its own motion; therefore, said petition will not be permitted to be filed." (Emphasis added.)

The same principle has been enunciated and applied in the cases of

Harvey v. Aurora and G. Ry. Co., 174 Ill. 295, 304-305, 151 N. E. 163;

Chicago and Northwestern Railway Co. v. Galt, 133 Ill. 657, 667, 24 N. E. 674;
Smith v. Chicago and Western I. R. R. Co., 105 Ill. 511.

The District Court having acquired no jurisdiction of the subject matter of the action by the original Petition for Condemnation, then all further proceedings based upon the said petition were ineffective. This is particularly true with respect to the Declaration of Taking which was filed on November 12, 1942, and the Judgment on First Declaration of Taking entered on the same day. It must be borne in mind that the Declaration of Taking was filed pursuant to the provisions of 40 U. S. C. A. 258a, which provides that such declaration of taking may be filed "with the petition or at any time before judgment." In other words, the declaration of taking is not the petition, nor can it take the place of the petition. It may be filed simultaneously with the filing of the petition, or at any time after the petition has been filed and before judgment, **but it may not be properly filed prior to the filing of a petition which meets the statutory requirements.** Under said Section 258a the purported effect of the filing of such declaration of taking and the entry of judgment thereon is to divest petitioners of the title to their property, and to vest the same in the United States of America. Obviously, the Court has no power to divest petitioners of the title to their property, unless it has acquired jurisdiction of the subject matter of the action by the filing of a petition sufficient to give such jurisdiction.

Inasmuch as the Petition for Condemnation failed to contain any semblance of an allegation as to the purpose for which the property was sought to be taken, as required by Section 2 of Chapter 47, Revised Statutes of Illinois 1943, it is apparent that the District Court failed to acquire jurisdiction of the subject matter of the action; that the Judgment on First Declaration of Taking made and en-

tered in the District Court on November 12, 1942, was and is coram non judice, and that said judgment should have been vacated on either or both of petitioners' motions.

III.

The Petition for Condemnation, as Amended, Sets Forth the Purpose for Which the Land Was Sought to Be Taken, But the Purpose So Set Forth Is Not One of the Purposes for Which Condemnation Is Authorized by the Act Under Which the Proceeding Was Brought, and Hence the Suit Cannot Be Maintained; the Court Had No Jurisdiction of the Cause of Action; and the Proceedings Should Have Been Dismissed.

The Amendment to the Petition for Condemnation filed by the Government on November 17, 1943, cured, in part, the defect in the original petition, although it came too late to validate the Judgment on First Declaration of Taking which had been made and entered more than a year before. By this amendment the Government undertook to set forth the purpose or purposes for which the land was being taken, but instead of showing one or more of the purposes for which condemnation is authorized under the Act, pursuant to which the action was brought, on the contrary, it expressly shows on its face that the purpose for which the land is sought to be taken does not constitute one or more of the purposes recognized by the Act.

As pointed out above, the Act permits condemnation of land for (1) fortifications, (2) coast defenses, (3) military training camps, and (4) for the construction and operation of plants for (a) the production of nitrate and other compounds, (b) the manufacture of explosives and other munitions of war, and (c) for the development and transmission of power for the operations of such plants. The Amend-

ment to the Petition for Condemnation alleges, in the language of the statute, that the lands are being taken for the purposes of

> "the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operations of such plants."

If the petition had stopped there it might, under the authority of the decision in the case of **City of Oakland v. United States, 124 Fed. (2d) 959**, have been deemed sufficient, as a matter of pleading, although such an allegation would have been contrary to the actual facts. However, the Government did not stop with this general allegation, but proceeded to allege that the taking was

> "pursuant to the determination of the said Secretary of War that said lands are necessary and essential for such purposes, as is set forth in said letter of said Secretary of War, dated March 26, 1942, a certified copy of which said letter is duly filed herein simultaneously with the filing of this amendment to this petition, and is by this reference thereto incorporated herein the same as though it were set forth in full herein."

The letter so incorporated in the petition recites that

> "It is necessary that certain land located and situated in Madison County, Illinois, be acquired by the United States for use in the establishment of the Granite City Engineer Branch Depot, Granite City, Illinois,"

and that

> "You are advised that the above mentioned land is necessary to provide adequately for the establishment of a supply depot and for related military purposes."

Thus the plaintiff-appellee limited the general allegations contained in the petition and which followed the language of the statute by the specific statements in the letter.

Accordingly, the legal effect of the allegations contained in the Petition for Condemnation, thus amended, is to allege that the purposes for which the land is being taken are

> "for use in the establishment of the Granite City Engineer Branch Depot, Granite City, Illinois,"

and or

> "the establishment of a supply depot and for related military purposes."

The expression "related military purposes" must mean military purposes which are related to a supply depot. They cannot be related to anything else, and the Secretary of War is certainly not authorized nor presumably was he attempting under authority of the Act in question to condemn land for "military purposes" in general.

Neither citation of authority nor argument should be needed to demonstrate that an "engineer branch depot" or a "supply depot" does not come within any of the statutory classifications of (1) fortifications, (2) coast defenses, (3) military training camps, or (4) construction and operation of plants for (a) the production of nitrate and other compounds, (b) the manufacture of explosives and other munitions of war, and (c) for the development and transmission of power for the operations of such plants. The Government offered no evidence as to what is meant by the term "engineer branch depot" or "supply depot," nor any evidence as to what is actually being done at the Granite City Engineer Branch Depot, which was well established and had been in operation for perhaps a year or more at the time of the hearing on petitioners' Amended Motion to Vacate Judgment and to Dismiss,

although we do not admit that any such evidence would have been admissible if it had been offered.

Petitioners' Amended Motion to Vacate Judgment and to Dismiss duly raised the question as to whether or not said Petition for Condemnation, so amended, set forth a purpose or purposes within the said Act, duly raised the question as to whether or not said Petition for Condemnation, so amended, alleged that the Secretary of War had made any finding or determination that the land is needed for any one or more or all of the purposes for which condemnation is authorized by said Act, and duly raised the question as to whether or not said Petition for Condemnation, so amended, alleged that the Secretary of War had requested the Attorney General of the United States to institute proceedings to acquire the land for any one or more of the purposes for which condemnation is authorized by said Act.

Said Amended Motion to Vacate Judgment and to Dismiss was denied on November 30, 1943, from which ruling petitioners duly appealed.

In considering the correctness of this ruling two well-recognized principles of law must be borne in mind. In the first place, the authorities uniformly hold that statutes delegating the power of eminent domain are strictly construed in favor of the landowner. Thus in the case of **Northern Mining & Trading Co. v. Alaska Gold Recovery Co., 20 Fed. (2d) 5**, the Court said (l. c. 8): "Such statutes are universally construed strictly * * *."

In the case of **United States v. Rauers, 70 Fed. 748**, the rule was stated that:

> "A fundamental principle of law controlling all matters of this character is that every statute which undertakes to appropriate in any manner the property of private persons for public use must be strictly construed. One of the great aims of Government is to secure to each citizen the enjoyment of his estate. On the other hand, in cases of public necessity, the

right of the individual must yield to the right and demand of the public; but, since that demand is in derogation of private right, it must be closely scrutinized and **the expression of legislative purpose in which it is conveyed, must be strictly construed.**

"'So high a prerogative as that of divesting one's estate against his will should only be exercised where the plain letter of the law permits it, and under a careful observance of the formalities prescribed for the owner's protection.' Cooley, Const. Lim., p. 651."

And in **United States v. West Virginia Power Co. et al., 33 Fed. Supp. 756**, the Court said, l. c. 759:

"The power of eminent domain is arbitrary in character and subversive of the right of private property and before it can be exercised by any officer of the Government, its delegation to him must plainly appear and may not be deduced from any ambiguous language or by doubtful inference. **Laws authorizing public officers to exercise the sovereign power of eminent domain are strictly construed.** United States v. A Certain Tract of Land, C. C., 70 F. 940; Delaware, L. & W. R. R. v. Morristown, 276 U. S. 182, at page 192, 48 S. Ct. 276, 72 L. Ed. 523, and authorities cited therein. So it must first clearly appear from the petition that the federal officers are authorized to institute this proceeding and upon what that authority is based. Dept. Public Works v. Lewis, 344 Ill. 253, 176 N. E. 345."

And in **18 American Jurisprudence 650**, the rule was stated:

"A grant of the power of eminent domain, which is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice, will never pass by implication; and when the power is granted, the extent to which it may be exercised is limited to the

express terms or clear implication of the statute in which the grant is contained. In other words, **statutes conferring the power must be strictly construed.** Clear legislative authority must be shown to justify the taking. Authority cannot be implied or inferred from vague or doubtful language. When the matter is doubtful, it must be resolved in favor of the property owner."

Similar statements and applications of the rule may be found in

Delaware, L. & W. R. Co. v. Morristown, 276 U. S. 182, 192;
United States v. Certain Tract of Land, 70 Fed. 940, 943;
United States v. Threlkeld, 72 Fed. (2d) 464, 466;
Harvey v. Aurora & Geneva Ry. Co., 174 Ill. 295, 51 N. E. 163;
29 Corpus Juris Secundum 806, 1135.

In the second place, it is well established that the right of the United States to maintain its suit having been appropriately questioned, the burden was upon the United States to establish its lawful right to maintain the suit.

In **United States v. Sixty Acres etc., 28 Fed. Supp.** 368, the Court expressed this principle as follows:

"In view of the fact that the motion to dismiss involves the lawful right of the petitioner to proceed by way of condemnation under the law of eminent domain, **the petitioner,** under applicable law, **has the burden of establishing its lawful right to proceed.**"

And in the case of **United States v. Eighty Acres etc., 26 Fed. Supp. 315,** the same principle was expressed by the same Court as follows:

> "The right of the plaintiff to maintain the suit having been attacked by the defendants upon the grounds that plaintiff is without lawful authority to condemn the land in question and is seeking to take the land by right of eminent domain for an unauthorized purpose, **the burden was upon the plaintiff to establish its lawful right to maintain its suit.**"

In Illinois and in all procedural matters the case is governed by the laws of that state, this rule has been enunciated in the case of **Department of Public Works v. Lewis, 344 Ill. 253, 176 N. E. 345**, where the Court said, l. c. 255:

> "While no plea or answer is required of the property owner he has the undoubted right to contest the petitioner's right to condemn, and this he may do by motion to dismiss, **and when he does so the burden is thrown upon the petitioner to maintain its right by proper proof.**"

And again in the case of **Lieberman v. Chicago R. T. R. Co., 141 Ill. 140, 30 N. E. 544**, the Court said, l. c. 144:

> "The property owner has the undoubted right to controvert the petitioner's right to condemn, and when he does so **the burden is thrown on the petitioner to maintain its right by proper proofs.**"

Applying these principles to the present case, we find that the Act under which this proceeding is brought designates specifically and precisely the purposes for which the Secretary of War may institute condemnation proceedings. But nowhere in the statutes do we find that the Secretary of War is authorized to institute proceedings to condemn land for "engineer branch depots" or "supply depots" or for "related military purposes."

Nor did the Government make any effort to meet the burden which was placed upon it by the filing of Peti-

tioners' Amended Motion to Vacate Judgment and to Dismiss by showing that an "engineer branch depot" or a "supply depot" is a fortification, coast defense, a military training camp, a plant for the production of nitrate and other compounds, a plant for the manufacture of explosives and other munitions of war, or has anything to do with the development and transmission of power for the operations of such plants. From the silence of the Government counsel in this respect, we are justified in assuming that they recognized (a) that such evidence, if available, would be inadmissible, and/or (b) that no such evidence was or could be made available.

In its brief filed in the Court of Appeals the Government rested its argument with respect to the statutory authorization for the present condemnation proceedings upon the proposition that because an engineer branch depot, which is essentially nothing more or less than a warehouse, contains certain equipment and supplies which are ultimately distributed to the armed services, and by them used, perhaps in Italy, India or New Guinea, for the construction of fortifications, the land on which such a depot is to be constructed is needed for the "prosecution of works for fortifications."

In making such contention, the Government misconstrued the meaning of the term "works" as used in the statute. Although the Government cited the case of Ex Parte Hall, 1 Pick. 261 (Mass. 1823), in which it is said that "in a statute which applies to military matters, the language therein will be given the military significance" and the case of City of Richmond v. Richmond & Danville R. R. Co., 21 Gratt. 604, 6[illegible]3 (Va. 1872), in which it is said with respect to the word "works" that "In military engineering, it means fortresses, fortifications, ramparts, bastions, and the like," it utterly ignored these definitions and sought to interpret the term "works" as if it were singular

nd not plural, and as if it applied to the work incidental
o the construction of fortifications, rather than to the
ortifications themselves.

The Government would have the language "prosecution
f works for fortifications" mean the doing of any work
hich has any bearing, no matter how remote in space
r in time, upon the erection or construction of fortifica-
ons. But, as Webster's New International Dictionary
efines the term "works," in a military sense, it means:

> "A series or set of fortified structures, as trenches or earthern barricades (See Work, n., 17)."

nd referring to the noun "work" we find:

> "17. Fort. A fortified structure of any kind, as a building, fort, earthen barricade, trench, etc. An **open work** gives protection only on the side of the enemy's approach; whereas a **closed work** offers protection against a hostile approach from any direction."

t is clear that the word "works" as used in the statute
nd in a military sense refers to the structures or devices
hich are to serve as fortifications and not to the labor
hich is exerted in their construction. Thus the statute
uthorizes the condemnation of land which is needed for
he site, location, construction or prosecution of fortresses,
amparts, bastions, trenches, earthen barricades, build-
gs, and the like which are designed for or as fortifica-
ons. Clearly the Granite City Engineer Branch Depot,
ven as its use and function has been described in the Gov-
rnment's brief, but without supporting evidence, does not
onstitute a fortification or any structure used or designed
or a fortification of any kind or character whatsoever.

As the Government sought to construe the statute, any-
ing which might ultimately contribute to the labor used

in the construction of a fortification in any corner of the globe would constitute "works for fortifications." On this theory, the drawing of plans and designs would constitute "works for fortifications" and hence the Government could condemn an office building. Likewise the transporting of tools and equipment to be used for such purpose would constitute "works for fortifications" and the Government could condemn trucks, railroads, steamships or any other means of transportation. Since fortifications can only be built by men, and men need food, clothing and shelter, the Government could condemn a canning factory, a clothing factory, and a residence, apartment building or hotel, all on the theory that such comes within the meaning of the "prosecution of works for fortifications."

No such strained or farfetched construction of the statute is called for or justified. In the military sense, as contended for by the Government, "works" for fortifications constitute structures or devices intended to be used for fortifications. They are the fortifications themselves, and not the "work" or labor which is done in connection with the erection or construction of fortifications.

On the record thus presented, it is apparent that the Petition for Condemnation, as amended, did not set forth facts sufficient to authorize condemnation under the Act, pursuant to which it was brought, but, on the contrary, expressly showed on its face that the purpose for which the land was and is sought to be taken did not and does not constitute one or more of the purposes for which condemnation proceedings may be instituted under said Act;

that the suit cannot be maintained; that the Court had no jurisdiction over the subject matter of the action; and that the petition and proceedings should be dismissed.

Respectfully submitted,

THOMAS S. McPHEETERS,
HENRY DAVIS,
1630 Boatmen's Bank Building,
St. Louis, Missouri,
GEORGE D. BURROUGHS,
Edwardsville, Illinois,
Attorneys for Petitioners.

BRYAN, CAVE, McPHEETERS & McROBERTS,
1630 Boatmen's Bank Building,
St. Louis, Missouri,
WARNOCK, WILLIAMSON & BURROUGHS,
Edwardsville, Illinois,
Of Counsel.